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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES E. LAWYER, Defendant and Appellant.	A124152 (San Mateo County Super. Ct. No. SC067252A)

Charles E. Lawyer (appellant) was convicted, following a jury trial, of possession of cocaine, being under the influence of a controlled substance, and driving with a suspended or revoked driver's license. On appeal, he contends the trial court's refusal to grant immunity to a potential defense witness violated his rights to compulsory process and due process under both the California and federal Constitutions. We shall affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged by amended information with felony possession of cocaine (Health & Saf. Code, § 11350, subd. (a)—count one); misdemeanor being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)—count two); and two counts of misdemeanor driving with a suspended or revoked driver's license (Veh. Code, § 1460.1, subd. (a)—counts three and four). The information alleged two prior felony convictions as a probation bar and strike as to count one (Pen. Code, §§ 1203, subd. (e)(4), 1170.12, subd. (c)(1)), with four prior misdemeanor convictions for driving without a license alleged as to counts three and four (Veh. Code, § 14601.1, subd.

(b)(2)). The prosecutor subsequently dismissed count four and the related prior conviction allegations in the interest of justice.

Following a jury trial, the jury found appellant guilty on all three counts. In the bifurcated court trial on the prior convictions, the trial court found true all of the alleged prior convictions.

At the February 20, 2009 sentencing hearing, the court granted a defense motion to dismiss appellant's prior strike. The trial court then sentenced appellant to the mitigated term of 16 months in prison on count one and a concurrent term of time served on the two misdemeanor counts.

On February 26, 2009, appellant filed a notice of appeal.

FACTUAL BACKGROUND

Prosecution Case

On October 1, 2008 at approximately 11:30 p.m., San Mateo Police Officers Jason Reed and Steven Casazza stopped a green pickup truck that appeared to be driving 55 to 60 miles per hour in an area where the speed limit was 35 miles per hour. Reed approached the driver's side of the car while Casazza approached the passenger side. Appellant was the driver of the truck and the sole passenger was Raymond Edberg. Initially, appellant seemed calm, but after Reed asked for his driver's license, appellant "immediately started breathing rapidly and moaning in pain, throwing his head back, and pushed [*sic*] his arm straight down onto the driver's seat as if he were in some kind of discomfort." This behavior was completely inconsistent with how he had appeared when Reed approached the truck.

Reed opened the truck door and asked appellant if he had any medical problems. Appellant said that he had inhaled caustic chemicals as a teenager and had diminished lung capacity. When Reed asked if he needed medical attention, appellant replied, "No, man. I just need a big hit of weed. I don't use pharmaceuticals." Reed asked if appellant had a medical marijuana card, and appellant said he did not. Reed asked appellant at

least three more times if he needed medical attention during the encounter, and each time appellant said no, but that he wanted "some weed."[1]

Reed ran a check on appellant's driver's license and learned that his driving privilege had been suspended or revoked. He also called paramedics and the fire department to come to the scene to evaluate appellant.

As Reed spoke with appellant, he noticed that appellant was holding a blue butane lighter and "kept scooting his hand over to the cup holder towards the middle of the bench seat of the truck, and that was the movement consistently." Reed repeatedly asked appellant to get out of the truck, but appellant said he could not get out because his medical condition made him weak. Appellant said he and Edberg had just spent 16 hours "pulling electrical wire" in a house in South San Francisco.

Reed asked appellant to step out of the truck, so the paramedics could evaluate him better on the tailgate. At first, appellant refused, and then made a "feeble attempt to get out of the car by swinging his left foot out and letting it hang out of the driver's door," as he continued to scream and moan loudly. The paramedics arrived and asked appellant to get out of the truck so they could evaluate him, but appellant refused. Reed ordered appellant to get out of the truck, but he again refused. Reed decided that appellant needed to be removed from the truck, for officer and paramedic safety reasons. Reed had no idea what appellant might be sitting on or what was hidden in the seat where he kept reaching, and so decided to try to pull him from the vehicle.[2]

Reed grabbed appellant's left hand to try to get him into a "rear wrist lock control hold," but appellant yanked his hand away, wrapped both arms around the steering wheel, and said he was not getting out of the car. Reed was unable to pull appellant's left arm

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[1] About three or four minutes into the stop, Casazza had Edberg, the passenger, step out of the truck.

[2] Reed believed there was something hidden because of appellant's "furtive movements toward the center console, his unwillingness to cooperate with a reasonable request to exit the vehicle and give him medical attention. [Reed] believed he may have been hiding something, either contraband or a weapon."

and hand off the steering wheel, and so he decided to use his Taser on appellant. After removing the dart cartridge from the Taser to make the contact less painful and warning appellant that he would be Tased if he did not get out, Reed Tased appellant for one five-second cycle.

Appellant immediately let go of the steering wheel and slid on his back toward the passenger door. Officer Casazza and another officer removed appellant from the vehicle and placed him on the ground. Appellant struggled with the officers as they tried to handcuff him. Once appellant was handcuffed, officers moved him to the tailgate for a medical evaluation. Appellant seemed agitated; he screamed and used foul language with the medical staff, and refused to answer questions. Appellant ultimately was transported by ambulance to a hospital for further evaluation. The paramedics were not going to take him because they believed he was faking his medical condition, but Reed decided to "err on the side of caution to make sure he is okay."

After appellant was taken to the hospital, Reed searched the truck's interior, starting in the area of the cup holder, where he had seen appellant reaching earlier. Beneath the cup holders, he found a clear plastic bag with what appeared to be cocaine base or crack cocaine inside. Reed believed that the butane lighter appellant had been holding earlier could have been used to smoke crack cocaine. Based on his training and experience, people who smoke crack usually prefer a butane lighter because crack is hard to ignite and the flames of a butane lighter burn hotter. It was stipulated that the white powdery substance inside the plastic bag was cocaine base weighing seven tenths of a gram, which is a usable amount. Reed opined that this was also a usable amount for two people.

Because appellant had been taken to the hospital, Reed did not continue searching the vehicle, but instead arrested Edberg, had him transported to the San Mateo County Jail, [3] and then went to the hospital to see appellant. Appellant was in an examination

[3] Reed did not find any smoking pipes in the truck, but Edberg later told him that, after he left jail, he went back to the truck and found two pipes.

room and, from outside the room, Reed heard appellant talking continuously even though he was alone. When he went into the room, Reed saw that appellant was grinding his teeth, licking his lips, and sweating; he was also unable to sit still. Appellant yelled at Reed and the doctors and nurses who came into the room.

Based on appellant's behavior and having found the cocaine base in the truck, Reed decided to evaluate appellant for being under the influence of an illegal stimulant. He had conducted such an evaluation no fewer than 600 times. In addition to observing appellant's behavior, Reed measured his pupils and his heart rate. Reed asked appellant to provide a urine sample, but appellant refused, even after being admonished that his refusal could be used against him as evidence of consciousness of guilt. The court found that Reed qualified as an expert in evaluating a person under the influence of an illegal stimulant, and Reed opined that appellant was under the influence of a stimulant on the night in question.

After Reed advised appellant of his *Miranda*[4] rights and appellant indicated that he understood them, appellant said, "So what if I used? I am not hurting anybody." When Reed asked if he wanted to talk about his recent drug use, appellant said no and told him to "[a]sk your buddy what I said." Reed assumed appellant meant Officer Swiger, who was at the hospital with appellant before Reed arrived. Swiger testified that appellant had spontaneously said, three different times, that he had used cocaine. Appellant's hospital admission records stated that he had a "history of cocaine abuse." It also stated that appellant "[s]tates was smoking crack earlier tonight. Denies other ingestions." Elsewhere in the admission records, it was stated, "Historian reports cocaine abuse." Under diagnosis, an entry made by the evaluating physician listed appellant's diagnosis as, "Primary: Abuse/cocaine." Below that, under "Discharge," was written, "Cocaine abuse."

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

Defense Case

Appellant testified that, before the traffic stop, he and Ray Edberg had been rewiring two houses for over twelve hours. He had been working in the attic and underneath the house all day and the cold affected his lungs, which were hurting by 8:00 p.m. Appellant had suffered from chemical pneumonia since an incident that occurred when he was 17 years old, which caused irreparable damage to his lungs. At the time of the traffic stop, he was suffering from a flare-up of this condition.

Edberg was the owner of the vehicle appellant was driving. Appellant was driving because Edberg was falling asleep behind the wheel and almost hit the median. Appellant knew that Edberg had bought some cocaine earlier in the day, but did not see him use it. Appellant had no ownership interest in the cocaine and did not use cocaine during the time he was with Edberg that day. He did not know where Edberg had stored the cocaine in the truck.

Appellant told Officer Reed that he did not have his Albuterol inhaler, which provides temporary relief for his lung condition, and that he was "going to get some pot to smoke because it helps me cough and dries my lungs." He asked for Albuterol at the hospital, but it took them two hours to give it to him. Appellant did try to get out of the truck upon Reed's request, but his lungs started hurting and he was trying to wait for the pain to subside. He squeezed the butane lighter and held onto the steering wheel because it helped to ease the pain in his lungs. He did not remember moving his hand toward the cup holder, and did not know the cocaine was there. At no time during his encounter with Reed or at the hospital did appellant feign his condition. He had gone to a hospital emergency room in 2006 for a similar lung problem, and was given oxygen.[5]

Appellant did not use cocaine within the 48 hours before his arrest. When he said, "So what if I use? I'm not hurting anybody," he was talking about marijuana, not cocaine, though he did not specify that he was talking about marijuana. He never said

[5] The defense introduced records documenting the 2006 hospital visit.

anything to any officer or medical personnel about using cocaine. Appellant did not submit to a urine test at the hospital because he was still handcuffed and in pain.

Rebuttal

Officer Reed was not present when the hospital staff took appellant's medical history and he did not tell the staff anything about the circumstances of appellant's arrest or his condition.

DISCUSSION

The Trial Court's Refusal to Grant Use Immunity to Raymond Edberg

Appellant contends the trial court's refusal to grant use immunity to potential defense witness Raymond Edberg violated appellant's rights to compulsory process and due process under both the California and United States Constitutions.

Trial Court Background

The probation report, in its summary of the records from the police and District Attorney's office, stated that when police asked Edberg whose crack cocaine was found in the car, Edberg "replied that he and [appellant] had purchased it together earlier in the day. [Edberg] stated 'we both put in on it.' He additionally stated that he and [appellant] were smoking it together during the day."

Defense counsel filed a motion asking the court to grant use immunity to Edberg. At the hearing on the defense's request for use immunity, Edberg's attorney told the court that Edberg had already pleaded no contest in this matter and had been placed on probation. Appellant's attorney agreed with the trial court's characterization of Edberg as having given inconsistent statements about appellant's involvement in the cocaine possession or purchase, first inculpating appellant, and later, in a conversation with an investigator and others, exculpating him and "accepting full responsibility himself."

Edberg's attorney then told the court that he had advised Edberg that "he has a Fifth Amendment right not to testify because he could be prosecuted for making a false statement to authorities, particularly a statement to [the prosecutor] and the investigating officer in an interview that took place before the potential first trial. [¶] . . . [¶] He was asked whether [appellant] was present at the time he, Mr. Edberg, purchases some crack

cocaine. And I believe that he told the officer that he was not present, that [appellant] was not present. [¶] In fact, that statement was false. And that he would testify that [appellant] was, in fact, present during his, Mr. Edberg's purchase of the crack cocaine. [¶] Now initially, you know, in his initial statement to the police, he told the police that they purchased it together. In other words, they were together when he purchased it. But there were other statements attributed to him in that additional police interview that he denies making whatsoever. So he doesn't have a Fifth Amendment privilege with regard to those statements, but they're not—he says he didn't make them. [¶] So, really, the issue is whether he was asked by the investigating officer and [the prosecutor] in the jail before the first trial attempt—he did make a false statement to them saying that [appellant] was not present when he, Mr. Edberg, purchased the crack cocaine. And, in fact, I think he would testify that [appellant] and he were together in the vehicle when he made the purchase, but that he didn't—[appellant] didn't have any part in it. [¶] . . . . [¶] My concern is that the prosecutor would file charges saying [Edberg] made a false statement to her and the investigating officer in their investigation of the case."

The prosecutor confirmed that she would not grant immunity to Edberg. Defense counsel then asked Edberg if appellant had "any part in the purchase of cocaine" and Edberg refused to answer on the ground that it might incriminate him. Edberg also affirmed that his answer would be the same to any related questions.

The court then stated: "Based on the representations of counsel and the offers of proof . . . , it does not appear to me that should Mr. Edberg testify with a grant of immunity that his testimony would be clearly exculpatory toward [appellant]. It appears, based on the offers of proof and representations, that Mr. Edberg made statements that might tend to incriminate [appellant] in this case, and at best his proffered testimony is equivocal. [¶] It is true that he gave different statements at different times, and some of those statements tend to exculpate [appellant], but the initial statement apparently does not. [¶] And, accordingly, the Court will deny [defense counsel's] request to [confer] use immunity on the former co-defendant Raymond Michael Edberg."

Defense counsel offered a different interpretation of the offer of proof by Edberg's attorney, stating that "the current version from Mr. Edberg is that Mr. Edberg made the purchase alone even though he was in the company of my client. [¶] And at most what that does is show that he was aware it was purchased, but it does at least stand as establishing that it was solely purchased by Mr. Edberg." The court disagreed, stating: "I didn't get that impression at all. And, in fact, [the prosecutor] stated otherwise. I don't know if it was this morning or not, but . . . it was my impression that in the initial conversation it was the defendant and Mr. Edberg who were together when they purchased the narcotics. [¶] . . . [¶] Okay. And I don't think that is in any way exculpatory toward [appellant]. In fact, it is anything but. [¶] . . . [¶] And indicating that he was either a principal or an aider and abettor in the purchase of the drugs and/or he had at least knowledge of their presence, and it totally inculpates him as my interpretations of the offers of proof. [¶] And, accordingly, since the evidence need be exculpatory, this certainly isn't, and it is ambiguous at best. And that is why the Court is not conferring use immunity."

Legal Analysis

"Under California law, a witness may not be prosecuted for any act about which he or she was required by the district attorney to testify. ([Pen. Code] § 1324.) In addition to broad transactional immunity, there is also 'use immunity'—'[i]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom . . . .' [Citation.] Use immunity does not afford protection against prosecution, but merely prevents a prosecutor from using the immunized testimony against the witness. Use immunity provides sufficient protection to overcome a Fifth Amendment claim of privilege. Transactional immunity is not constitutionally required." (*People v. Cooke* (1993) 16 Cal.App.4th 1361, 1366.)

The California Supreme Court has "characterized as 'doubtful' the 'proposition that the trial court has inherent authority to grant immunity.' [Citations.]" (*People v. Stewart* (2004) 33 Cal.4th 425, 468, quoting *People v. Lucas* (1995) 12 Cal.4th 415, 460 (*Lucas*).) Our Supreme Court has also stated that it is "possible to hypothesize cases

where a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial." (*People v. Hunter* (1989) 49 Cal.3d 957, 974 (*Hunter*).) "Nevertheless, in *Lucas* as in *Hunter* and other cases (*In re Williams* (1994) 7 Cal.4th 572, 610 . . . ; *People v. Cudjo* (1993) 6 Cal.4th 585, 619 . . .), [the Supreme Court] proceeded to assume that such inherent judicial authority exists and to address whether the defendant met the stringent requirements described in *Hunter* and [*Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964, 972 (*Smith*)] under which such relief conceivably might be warranted." (*Stewart*, at p. 468.)

In *Stewart*, *supra*, 33 Cal.4th 425, 469, the court described two tests outlined in *Hunter*, *supra*, 49 Cal.3d 957, which the *Hunter* court had taken from *Smith*, *supra*, 615 F.2d 964, 972, the first of which "would recognize the authority of a trial court to confer immunity upon a witness when each of the following three elements is met: (1) 'the proffered testimony [is] clearly exculpatory; [(2)] the testimony [is] essential; and [(3)] there [is] no strong governmental interest[] which countervail[s] against a grant of immunity.' [Citation.]" The *Stewart* court also described the second test discussed in *Hunter*, which would authorize a trial court to grant use immunity to a defense witness when " 'the prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential noncumulative exculpatory evidence,' thereby distorting the judicial fact-finding process. [Citations.]" (*Stewart*, at p. 470.)

In the present case, the trial court found that Edberg's proffered testimony was not clearly exculpatory, as is required under the first test set forth in *Hunter*, *Stewart*, and other cases. Instead, it concluded that the proposed testimony was equivocal and ambiguous. Although the focus of our analysis differs slightly from that of the trial court, we agree that Edberg's expected testimony was not "clearly exculpatory." (See *Stewart*, *supra*, 33 Cal.4th at p. 469.)

Appellant was charged in this matter with possession of cocaine and being under the influence of a controlled substance. Edberg's expected testimony was "clearly exculpatory" (*Stewart*, *supra*, 33 Cal.4th at p. 469) as to appellant *only* with respect to the

initial purchase of the cocaine. The proposed testimony did not specifically address what took place after the purchase, and thus was ambiguous as to whether appellant was in possession or under the influence of the cocaine after its purchase. (See *ibid*.)

Regarding the second test, we have neither found nor been directed to any evidence that the prosecutor intentionally refused to grant immunity to Edberg in order to suppress "essential, noncumulative exculpatory evidence." (*Stewart, supra,* 33 Cal.4th at p. 470.)

We therefore conclude that under either of the two tests, the trial court did not err when it denied appellant's request to grant Edberg use immunity.

In addition, even assuming that the grant of judicial use immunity is permissible in California, and further assuming that Edberg's proffered testimony satisfied the requirements discussed in *Smith* and the applicable California Supreme Court cases, we conclude that appellant was not prejudiced by the court's failure to grant use immunity to Edberg. This is because, even had Edberg been permitted to testify that appellant had no part in the purchase of the cocaine, it is not reasonably probable that that the jury would have found him not guilty of possession or being under the influence of cocaine. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

First, as previously discussed, Edberg's expected testimony was clearly exculpatory only with respect to the initial purchase of the cocaine. Moreover, there was extremely strong evidence presented at trial that appellant possessed and was under the influence of the cocaine. This evidence includes Officer Reed's testimony that, while in the truck, appellant was holding a butane lighter, which is often used when smoking crack cocaine; that he made repeated furtive movements toward the area of the truck where the cocaine was hidden; and that he resisted removal from the truck. It also includes Reed's expert testimony that, pursuant to his evaluation at the hospital, he concluded that appellant was under the influence of a stimulant. Further, appellant refused to provide a urine sample even after being admonished that his refusal could be used against him as evidence of consciousness of guilt.

The evidence of guilt also includes appellant's statement to Reed: "So what if I used? I am not hurting anybody," as well as his suggestion that Reed ask his "buddy" what appellant had said about his recent drug use. It further includes Officer Swiger's testimony that appellant had spontaneously said, three different times, that he had used cocaine. Finally, the evidence of guilt also includes appellant's hospital admissions records, completed by medical personnel, which stated, *inter alia*, that appellant had said he "was smoking crack earlier tonight" and listed appellant's primary diagnosis as "Abuse/cocaine." In light of this strong evidence of appellant's guilt, we conclude that any error on the part of the trial court in refusing to grant use immunity to Edberg was plainly harmless. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)[6]

DISPOSITION

The judgment is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

_____
Richman, J.

[6] Given the strength of the evidence of appellant's guilt, our conclusion would not be different under the federal standard of error. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)